Editorial

This special issue of *LDD* is brought out in association with DITSELA (Development Institute for Training, Support and Education for Labour), the education and training arm of South Africa's three main trade union federations COSATU (the Congress of South African Trade Unions), FEDUSA (the Federation of Unions of South Africa) and NACTU (the National Council of Trade Unions). 'Ditsela' also means 'pathways' in seSotho.

This issue is special, firstly, because it comes over and above our regular two issues per year. But it is special also because it contains the proceedings of a notable event – a seminar on labour law organised by and for the labour movement under the banner *Engaging From A Working Class Perspective*, as explained by Gino Govender in the commentary below.

To appreciate the significance of the event, it needs to be viewed in the context of the short but vigorous history of labour law in South Africa – a history that is probably unique. The system of labour law was forged in the fires of struggle during the last two decades of apartheid rule. Militant trade unions demanded rights, an Industrial Court with jurisdiction to resolve 'unfair labour practices' was established in the vain hope of curbing the struggle, employers gradually bought into the new dispensation while government yielded to the inevitable. A participant, Halton Cheadle, describes from the inside what happened:

> 'In 1979 and 1980, as a bunch of labour lawyers and trade unionists, we seized on this extraordinary definition [of 'unfair labour practice'] and we built up a jurisprudence on the right to strike, a jurisprudence on the duty to bargain, a jurisprudence on unfair dismissal, a jurisprudence on anything and everything that hit us. Certainly for the first seven or eight years of the unfair labour practice, the links between the labour lawyers and the trade unionists were enormously close. We managed the jurisprudence.'[1]

Thus a new discipline was born, with employers and trade unions pulling from opposite ends while practitioners, academics and members of the Industrial Court researched, debated and formulated new rules of engagement at the centre of the fray.

The Labour Relations Act of 1995 (LRA) was one outcome of the process: mandated by the interim Constitution of 1993, drafted in consultation between government, business and labour, it encapsulated much of the new body of law that had evolved in this dynamic way.

Another outcome was a tradition of vigorous debate and engagement amongst the various participants in the system. This tradition reached a high

1 From 'Labour Market Flexibility: will a social pact help?' Paper for Harold Wolpe Memorial Seminar, 5 October 2005. The Industrial Court had jurisdiction to resolve 'unfair labour practices', a concept that was very broadly defined.

point in the Annual Labour Law Conferences that were held at the Law Faculty of the University of Natal (as it was then) from the late 1980s onwards, followed by even more forceful debate around the drafting of the new LRA. This period was immensely fruitful in that different parties – in particular, employers and trade unions, but also government officials, judges, practitioners and academics – heard each others' views directly and engaged face to face in a public forum, on neutral ground and in a spirit of rational discussion. This could not take away the issues of real contention that separate business and labour. It could, however, help in clarifying those issues as they actually were (also from the other party's point of view), away from media hype, and how the law could best regulate (or refrain from regulating) them.

A decade has passed since that era. The 'new' LRA and its institutions have become part of the legal landscape. But more than that has changed. Many participants in the debates of the early 1990s feel that much of the intellectual vibrancy experienced during that period has been lost. Various reasons can be found for this. For example, interaction between government, business and labour has become formalised in the 'NEDLAC[2] process' – that is, consultation over labour and developmental issues by representatives of the three constituencies at a level beyond the reach of most participants in the system.

The Annual Labour Law Conference, too, has arguably become a victim of its own success. From its humble beginnings it grew into a much bigger and much more expensive event, held at prestigious conference centres and attracting a different mix of participants – some would say, with employers and their legal representatives now forming a critical mass, and the thrust of the discussion changing accordingly. Certainly, many trade union representatives came to feel increasingly isolated in discussions perceived as being dominated by employers' views.

Also, in the broader discourse, it is arguable that a change set in. New principles being forged by the labour courts have been perceived as being increasingly responsive to employers' interests, as exemplified by the decision of the Labour Appeal Court in *Fry's Metals (Pty) Ltd v NUMSA & Others*.[3] In this climate, trade unions have felt the need to resort to power or the threat of power – for example, during the debate about the 2002 amendments to the main labour statutes – in order to influence the course of events.

It is trite that labour law embodies an equilibrium (or compromise) between the competing rights and interests of capital and labour. Dialogue between the parties, not only at the rarefied heights of NEDLAC but also on the ground, helps to strike that balance in appropriate ways and shape the development of the law on a sustainable basis. In recent years, to the extent that the authentic voice of labour has been muted, that dialogue has suffered.

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2 Established by the National Economic, Development and Labour Council Act 35 of 1994.

3 [2003] 2 BLLR 140 (LAC). The judgment upheld the principles that (1) nothing in the LRA prevents an employer from dismissing employees to increase its profits and (2) employees may fairly be dismissed for refusing to accept an employer's bargaining demand, provided the dismissal is final and not 'tactical'.

The DITSELA seminar represents a step towards reinvigorating this vital discourse. It was prompted in the first place by the need to reflect on the LRA's effectiveness from a labour perspective, and offered trade unionists an opportunity to deliberate about a central question: Has the LRA delivered what it promised?

The answers given to this question, and views expressed about the future, are important not only to trade unionists but to the labour law community as a whole. It places some of labour's key concerns on the agenda in a more structured manner than has been the case in recent years. It also informs the broader discourse with insights that employers, practitioners and academics may find instructive. Hopefully, some of the articles will provoke responses, and thus help to rekindle a tradition of debate that will clarify difficult issues that the protagonists have to resolve through negotiation or the use of power.

It is also to be hoped that the seminar will not be an isolated event but will inspire similar discussions at a national level. *LDD* will be eager to participate in disseminating the proceedings of these and other events where the debate will continue.

Darcy du Toit

Ditsela Labour Law Seminar

The seeds of the Ditsela Labour Law Seminar were planted following an evaluation of the 19th Annual Labour Law Conference that took place at the Sandton Convention Centre in July 2006. An overwhelming feature of this conference was the huge imbalance between union representatives and delegates from the legal and corporate sector. One could literally count the number of union delegates on one hand. Perhaps the cost of registration might have been an inhibiting factor.

The decision to organise a seminar to engage with law from a working class perspective was arrived at very swiftly and the process of democratic consultation on the aims, themes and structure began in August 2006. The only condition to Ditsela funding was that participation had to be opened to all trade unions irrespective of affiliation. It had to be a seminar for the labour movement by the labour movement, with the majority of delegates coming from the labour movement.

The seminar, held from 23–25 February 2007 on the campus of the University of the Western Cape, was a remarkable success. Delegates were alive and debating well into the night on a weekend. It was serious stuff not seen in the labour movement in this country for a long time. All the long hours of hard work organising, the painstaking discussions on content and preparation of papers proved well worth the effort. Ditsela wishes to place on record its thanks to all those lawyers, academics and union activists who contributed to the success of the seminar.

A combination of high-quality presentations, the excellent level of rigorous debate and the rich struggles and experience brought into the seminar

by union activists led to the idea of this publication. It serves not only as a record of the proceedings but as a reference resource to shop stewards and organisers. It is proudly dedicated to the unsung heroes and heroines of our society today, the shop stewards, who day in and day out, without financial reward, selflessly defend and advance the rights of workers in the workplace, in bargaining councils, at the CCMA, in the courts and in our communities.

Gino Govender
Executive Director, DITSELA

Summaries of articles

Law, Democracy & Development is accredited by the Department of Education as an approved journal for the publication of subsidised research output. In this special edition of *LDD*, articles submitted by academic authors were subjected to evaluation by independent referees in accordance with the requirements of the Department of Education. Other articles, though assessed by the editors of *LDD* and by independent experts, were not necessarily subjected to the academic evaluation process. Articles published in *LDD* do not necessarily reflect the views of the editors.

Roger Ronnie, in his closing address, drew up a balance sheet of the proceedings. While analysing trade unions as organisations dealing with more than simply wages and employment conditions, he also looked at their political limitations and assessed the gains and losses flowing from the 1995 LRA from a trade union perspective. In particular, the advent and growing entrenchment of 'trade union legalism' within South Africa's capitalist system is highlighted. The speech concludes by providing recommendations on how trade unions can try to avoid these pitfalls and promote the rights of the working class more effectively.

Ronald Bernikow opened the proceedings by assessing certain key areas of the CCMA's operations and the challenges it faces within the broader context of our labour laws. The speaker deals with the current state of CCMA operations and service delivery, as well as the debate over what has been termed the 'over-proceduralisation' of dispute resolution at the CCMA. He discusses the areas where the CCMA can, from the perspective of labour, be said to be performing well, as well as pointing to various shortcomings or gaps in the dispute resolution framework set up by the LRA. He concludes that the CCMA is a legitimate and important institution that has promoted a common industrial citizenship and provided a platform on which to confront future challenges.

Jan Theron examines the role of trade unions in relation to the difficult question of which workers are, or should be, regarded as employees for the purposes of labour legislation. The author provides a detailed discussion of the current hierarchies present in the workplace and the problems associated therewith, and suggests how trade unions could address these problems. The

author also provides a critical analysis of the 2002 amendments to the Labour Relations Act and the Basic Conditions of Employment Act, in terms of which workers are presumed to be 'employees' if certain conditions are present. The biggest challenge, he argues, is not so much to expose 'disguised' employment relationships (in which employees are disguised as 'independent contractors') as to extend protection to employees who are excluded from important provisions of labour legislation, such as those in 'triangular' employment relationships. However, the article warns against placing too much reliance on the courts. The best prospect for achieving broader legal protection, it concludes, is for trade unions to organise those who are excluded.

Rudi Dicks discusses the South African phenomenon of 'informalisation' of the workforce, which is characterised by workers shifting from permanent employment to casualised and fixed-term contracts, outsourcing and employment through labour brokers. These forms of employment are accompanied by, lack of job security, undermining of basic conditions of employment, erosion of workplace rights and decreasing access to skills and equity at work. The author considers the effects of the process and concludes by suggesting measures to provide legislative protection to vulnerable workers, including the establishment of a tripartite statutory body to regulate labour brokers; the development of a code of good practice for workers engaged in atypical employment contracts and improving monitoring and enforcement mechanisms through tougher penalties.

Mohammed Ismail deals with the contentious issue of unilateral changes to the terms and conditions of employment in the workplace. He draws a brief comparison between the remedies provided by the Labour Relations Act 66 of 1995 and the Labour Relations Act 28 of 1956 and looks at recent judicial decisions and their impact on the rights of employers and employees respectively. The author also discusses the definition of a unilateral change to the terms and conditions of employment and cites examples thereof. Finally, he examines the legal options at the disposal of employers who wish to change the terms and conditions of employment and the legal options and remedies available to the employees.

Darcy Du Toit provides a detailed discussion of discrimination on grounds that are branded 'unfair' with reference to the Constitution, the LRA, the Employment Equity Act (EEA) and International Labour Organisation Convention 111. The author examines the way that the courts have dealt with claims of unfair discrimination by employees up to 2006, noting various unclear and problematic interpretations of the meaning of 'discrimination' which present 'a danger to employees'. Also highlighted is the interpretation of affirmative action in some cases as a form of 'discrimination' that needs to be justified. He concludes by suggesting ways in which trade unions can help to make protection against unfair discrimination in the workplace more effective.

Tapiwa Gandidze discusses dismissals for operational requirements in terms of the LRA with reference to the code of good practice on dismissals for operational requirements. The author also analyses the 2002 amendments to the LRA which allow workers either to strike about the reason for dismissals

or refer such a dispute to the Labour Court. The author concludes by providing a detailed discussion of the legal requirements that employers need to comply with in order to ensure that dismissal is procedurally and substantively fair.

John Brown examines the enforcement of CCMA arbitration awards in terms of the LRA, as well as the enforcement of private arbitration awards in terms of the Arbitration Act of 1965. The author analyses relevant case law and highlights the real practical difficulties facing worker litigants in enforcing arbitration awards in their favour. The final section of the article deals with the enforcement of collective agreements and settlement agreements. The essential role of bargaining councils in monitoring and enforcing collective agreements is also highlighted. The article concludes that '[t]he challenge facing the labour movement is to equip its organisers with the legal knowledge and drafting skills to negotiate and draft agreements which best promote the interests of workers and avoid legal pitfalls when trying to enforce agreements which are challenged by an employer'.

Peter Carolus, Thierry Galani Tiemeni and **Kurt Ziervogel**, look critically at the Insolvency Act prior to the amendments of 2002 and the limited protection it gave workers on the insolvency of the employer. The effect of the Act was that workers' contracts of employment were automatically terminated by their employer's insolvency, leaving them with a limited preferent claim against the employer's insolvent estate. The authors discuss how the 2002 amendments to the Insolvency Act and the LRA addressed these problems by providing for the suspension rather than termination of employment contracts in the event that the business can be saved or sold as a going concern. They also discuss the right of workers as creditors to appoint their own liquidator to supervise the liquidation process and conclude with a detailed examination of challenges faced by trade unions on issues arising from the insolvency of employers.